LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 27 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. 279

EDWARD W. ANSPACH and
WALTER F. TURNER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ARTHUR WARNER
S. WARD SULLIVAN
9200 Wilshire Blvd.
Beverly Hills, California

JOHN J. DUNN
714 Symes Bldg.
Denver 2, Colorado
Attorneys for Petitioners

LONG BEACH REPORTER

TOPICAL INDEX

Page

Report of Opinion Below 2

Grounds on Which Jurisdiction is Invoked 2

Question presented for Review 2

Constitutional Provisions and Statutes Involved 3

Statement of the Case 4

Jurisdiction of the Court of First Instance 6

Reasons for Granting the Writ:

I

The United States Court of Appeals has decided an Important Question of Federal Law which has not been, but should be, settled by this court.

A. The premises involved are within the purview of the IV Amendment 6

B. Verbal declarations are "things" protected by the IV Amendment 7

C. The ultimate reason for granting the writ 7

Conclusion 8

Appendices

Appendix "A" 1a

Appendix "B" 9b

Appendix "C" 10c

TABLE OF AUTHORITIES CITED

Cases

	Page
Jones vs. United States, 362 U. S. 257, 80 S. Ct. 725 (1960)	7
Nueslein vs. District of Columbia, 115 F2d 690 (1940)	7
Silverman vs. United States, 365 U. S. 505, 81 S. Ct. 679 (1961)	7

IN THE

Supreme Court of the United States

October Term, 1962

No.....

EDWARD W. ANSPACH and
WALTER F. TURNER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and to the Associate Justices of the Supreme Court of the United States:

Petitioners pray a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on June 27, 1962, affirming judgments entered by the United States District Court for the District of Colorado after verdict of a jury finding that petitioners were guilty of violating Title 18, Section 1341 of the United States Code.

REPORT OF OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit has not been reported yet in the West Reporter System.

The opinion bears Nos. 6720 and 6721 in the above mentioned Court. A copy thereof is set forth in Appendix A, attached hereto.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgments sought to be reviewed are dated June 27, 1962, and were entered on that date. Copies thereof are set forth in Appendix B and Appendix C, attached hereto.

The statutory provision conferring on this Court, jurisdiction to review by Writ of Certiorari, the judgments in question is Title 28, Section 1254(1) of the United States Code.

QUESTION PRESENTED FOR REVIEW

I

Was there an unreasonable search and seizure within the purview of the IV Amendment where a United States Government Postal Inspector procured a hotel room adjoining another room in the same hotel in which one of petitioners was present, and such Government Inspector opened up one of two double doors ostensibly erected to provide among other things, optimum insulation for adjoining occupants so that both could have "strict" privacy, and such Government Inspector seated himself, near the opened door, and by means of eavesdropping overheard conversations engaged in by the said petitioner?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment IV to the Constitution of the United States providing as follows in part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ..."

Title 18, Section 1341 of the United States Code, providing as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

Petitioners Anspach and Turner were charged jointly with using the mails to defraud in violation of Title 18, Section 1341 of the United States Code. They were convicted; and their convictions were affirmed by the United States Court of Appeals, Tenth Circuit. Said affirmance was by a divided Court, Judge Ritter dissenting.

The testimony at the trial showed that petitioners were officers of a corporation that was in the business of aiding persons in securing business loans; that in rendering such aid they demanded and received advance fees on the promise that the fees would be returned if no loans resulted from their efforts; and that in a certain number of instances, although no loans resulted, the advance fees were not returned.

At the trial a United States Government Postal Inspector, named Marshall, testified that on a certain date in the Biltmore Hotel in California, (the city not being established) he procured a room adjoining one in which petitioner Anspach was having a conversation with one Russell (R. 121). Marshall then testified as follows (R. 121):

> "There was a door between those two rooms. There were two doors, one on his side and one on my side, looked like there are occasionally in hotels, *and I opened the one on my side back and sat near the door. . . .*" (emphasis furnished)

There was no testimony that if the witness had not opened the connecting door, he could have heard the conversation.

Obviously the main purpose of such double doors

in a hotel room is to provide optimum insulation for the mutual protection of the occupants of adjoining rooms, so that each of the occupants could have the privilege of "strict" privacy; and obviously, the opening of such door is the commencement of an authorized entry into the adjoining room.

Over petitioners' objection (R. 120) Marshall related conversations between petitioner Anspach and Russell.

In the operation of their business it appeared that petitioners represented to have available as a source of money for loans for their clients whom they were aiding in procuring such loans, the Morgan Engineering Company, and that petitioners forwarded to such company for processing, the applications and contracts it had entered into with its clients. Whether such applications and contracts were forwarded to the Morgan Engineering Company in good faith or merely as a ruse, was perhaps, the most vital issue of fact to be decided by the jury.

Petitioner Anspach's alleged conversation in the hotel room testified to by Marshall included the following (R. 122):

> "I heard Mr. Russell, whose voice I knew, tell Mr. Anspach the contracts were there in Los Angeles, these client contracts which had been down at Morgan Engineering Company, and were shipped back.
>
> Some discussion went on that I didn't hear, and I heard Mr. Anspach laugh very loudly and jovially, and say, 'you just keep them. This thing couldn't have worked out better for me

if I had planned it. This is just what I want. You just keep the contracts.'

"And I heard him laugh when he said that. He said 'Russ, it couldn't have been better for me if it was planned'."

These alleged admissions were extremely prejudicial in that they constituted the only direct evidence of bad faith, and without such admissions the jury may have found that petitioners had been acting in good faith.

JURISDICTION OF THE COURT OF FIRST INSTANCE

The jurisdiction of the United States District Court for the District of Colorado as the court of first instance is based upon an indictment found by the Federal Grand Jury in that district charging petitioners with violation of Title 18, Section 1341 of the United States Code.

REASONS FOR GRANTING THE WRIT

I

The United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

A. The premises involved are within the purview of the IV Amendment.

Petitioner Anspach was present in a hotel room, ostensibly as a guest or invitee of the person to whom the room was rented.

In *Jones vs. United States*, 362 U. S. 257, 80 S. Ct. 725 (1960), this Court stated as follows:

". . . No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that *anyone legitimately on premises where a search occurs may challenge its legality* by way of motion to suppress, when its fruits are proposed to be used against him. This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched. . . ." (emphasis furnished)

B. Verbal declarations are "things" protected by the IV Amendment.

Silverman vs. United States, 365 U. S. 505, 81 S. Ct. 679 (1961).

Nueslein vs. District of Columbia, 115 F2d 690 (1940).

In *Nueslein*, supra, the Court stated as follows: "The crucial thing 'found' in this 'search' was a declaration of fact by the defendant that has become decidedly incriminating . . . We conclude, nevertheless, that the officers' testimony regarding the defendant's declaration is inadmissible. . . . The rights of the defendant under the IV Amendment have been infringed . . ."

C. The ultimate reason for granting the writ.

In *Silverman*, supra, this Court stated as follows:

". . . Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law."

In consonance with such statement, in the area of illegal search and seizure the word "intrusion" should be given its generic meaning; and the most important criterion, therefore, would be whether the intimacies of the home were revealed.

Any other meaning, or the failure to consider as the most important criterion, whether or not the intimacies of the home were revealed, and the failure to require of police officers, a stricter standard of conduct, the protection intended to be given by the IV Amendment will become illusory, especially with the availability of electronic devices which at a great distance, or through thick walls, can procure the revelation of the intimacies of a home with as much effectiveness as a police officer can by entering a home by stealth and secreting himself beneath the master's bed.

Herein, by the commencement of an unauthorized entry into an adjoining hotel room, a government officer removed insulation to which petitioner was entitled.

CONCLUSION

Petitioners respectfully submit that the United States Court of Appeals for the Tenth Circuit has decided erroneously, serious and substantial questions with respect to the constitutional rights of Petitioners.

WHEREFORE, your Petitioners pray that this Petition for Writ of Certiorari be granted; that a review of the cause herein be made by this Honorable Court, and the judgments of the United States Court of Appeals for the Tenth Circuit, and of the United

ates District Court for the District of Colorado, be all things reversed, and for such other relief in the emises as this Honorable Court deem just..

Respectfully submitted,

ARTHUR WARNER
S. WARD SULLIVAN
JOHN J. DUNN
Attorneys for Petitioners

APPENDIX "A"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

June Term, 1962

FILED
United States Court of Appeals
Tenth Circuit
JUNE 27, 1962
ROBERT B. CARTWRIGHT
Clerk

EDWARD W. ANSPACH, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 6720

WALTER F. TURNER *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee,*	No. 6721

Appeal from the United States District Court for the District of Colorado.

Arthur Warner (S. Ward Sullivan was with him on the brief) for Edward W. Anspach.

John J. Dunn for Walter F .Turner.

Yale Huffman, Assistant U.S. Attorney, (Lawrence M. Henry, U. S. Attorney, was with him on the brief) for Appellee.

Before LEWIS and BREITENSTEIN, Circuit Judges, and RITTER, District Judge.

LEWIS, Circuit Judge.

The critical question presented by this appeal is whether evidence obtained by the intentional eavesdropping of government agents, unaccompanied by physical trespass upon constitutionally protected premises and unaided by the use of electronic or mechanical device, is admissible in federal prosecutions. Appellants contend broadly that the Fourth Amendment is a bar to the use of evidence obtained by eavesdropping and more specifically that the Fourth Amendment prohibits "the revelation of the intimacies of one's castle (when) supported by some slight proof of conduct on the part of a government officer that is not entirely 'cricket'." We find merit to neither contention, as applied to the facts in the cases at bar.

Appellants were indicted under a thirteen-count indictment alleging the mailing of separate pieces of mail in the perpetration of a scheme to defraud in

violation of 18 U.S.C. 1341.[1] They were convicted and sentenced to two-year sentences on twelve of the counts to run concurrently.

It was charged and proved to the jury's satisfaction that the appellants entered a scheme to organize and incorporate a small business loan service company, known as Beneficial Business Loan Service Corporation, hereafter referred to as BBLSC. By direct mail to small business owners, BBLSC represented that it had money available for loans which were not obtainable at local banks; that an advance fee was necessary to initiate processing of the desired loan, but that if the loan application were not accepted, the entire fee would be returned. Thereafter, salesmen were employed and instructed to offer false and misleading information at variance with the carefully worded written contract, to the effect that BBLSC had untold sums of money at its disposal; that over ninety per cent of the applications of business owners which were accepted by the company had resulted in the conclusion of loans; that the advance fee paid by

---

[1] "Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the directions thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

the business owner was to protect BBLSC in the event that the business owner refused to accept the loan once his application was processed and the loan obtained for him. The salesmen were equipped with a list of lenders, the names of which were merely copied from the telephone book; a letter from the Better Business Bureau, the reproduction and use of which was expressly forbidden; some false photostatic copies of letters of rejections and returned checks.

Although the corporation grew to national proportions, opening branch offices in various parts of the country, there is no evidence of the completion of any loans. There is a great deal of evidence of instances where the company accepted the advance fee and never returned it nor completed the loan. When complaints arrived at the company's office, letters were sent stating that the salesmen had no authority to vary the terms of the printed contracts and again assuring the would-be borrowers that they would receive their loans.

The sufficiency of the evidence is not now questioned and claim of error is limited to the admissibility of a portion of the testimony of government witnesses Marshall, Johnson and Perkins. Marshall, a postal inspector, testified that he had engaged a hotel room in California by prearrangement with one Russell, a former employee of BBLSC. Russell took an adjoining room where he had arranged a meeting with appellant Anspach. Two doors separated the adjoining rooms and it was possible for the witness to overhear much of the conversation in Russell's room by opening the door on the one side and sitting close to the door opening on Russell's room. Russell made demands upon

Anspach for money due him, refusing to deliver certain files of loan applicants until the money was paid. The witness testified:

> "A. I heard Mr. Russell, whose voice I knew, tell Mr. Anspach the contracts were there in Los Angeles, these client contracts which had been down at Morgan Engineering Company, and were shipped back.
>
> "Some discussion went on that I didn't hear, and I heard Mr. Anspach laugh very loudly and jovially, and say, 'You just keep them. This thing couldn't have worked out better for me if I had planned it. This is just what I want. You just keep the contracts.'"
>
> "And I heard him laugh when he said that. He said, 'Russ, it couldn't have been better for me if it was planned.'"

The interpretive impact of the Fourth Amendment guaranteeing the "right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures" is undoubtedly now in the process of judicial modernization found necessary by changing conditions. See *Lanza v. New York*, ... U. S. ....., decided June 4, 1962. Traditionally the concept of an invasion upon the right of privacy was premised within the theories of the law of trespass. Thus, the earlier cases refused to extend the meaning of "persons, houses, papers, and effects" or to apply "searches and seizures" to forbid hearing and sight. *Olmstead v. United States*, 277 U. S. 438, 48 S.Ct. 564, 72 L.Ed. 944, left the problem of telephone wire tapping to the interdiction of subsequent

legislation. And, although the Federal Communications Act outlawed the evidence obtained by wire tapping, the use of a detectaphone applied to the wall of an adjoining room to pick up one side of a telephone conversation violated neither the Act nor the Fourth Amendment, *Goldman v. United States*, 316 U. S. 129, 62 S.Ct. 993, 86 L.Ed. 1322.

Considerations of the value of the right of privacy inspired thought-provoking dissents by Justice Brandeis in Olmstead and Justice Murphy in Goldman. And appellants would read the philosophy of these dissents into the rationale of the recent cases of *Silverman v. United States*, 365 U. S. 505, 81 S.Ct. 679, 5 L.Ed. 734, where the Court reversed a judgment of conviction where evidence was obtained through an electronic device which penetrated the wall. Under the circumstances of an actual physical intrusion upon the defendant's premises, the Court refused to re-examine its holdings in Goldman and On *Lee v. United States*, 343 U. S. 742, 72 S.Ct. 967, 96 L.Ed. 1270, summarizing them as standing for the proposition that evidence obtained by eavesdropping is admissible where "the eavesdropping had not been accomplished by means of an unauthorized physical encroachment within a constitutionally protected area." *Silverman v. United States* at p. 510.

Although the "spike mike" of the Silverman case may have refined somewhat the definition of physical intrusion, courts of appeal which have considered Silverman have found no vacillation in the guiding principle. *United States v. Kabot*, 2 Cir., 295 F. 848; *Carnes v. United States*, 5 Cir., 295 F. 598; *Todisco v. United States*, 9 Cir., 298 F. 208. The present case

offers little reason to explore the ramifications of slight physical intrusion in operation in Silverman, for no electronic device was used and the eavesdropping was accomplished without resort to any physical intrusion upon the domain of another. If the use of this evidence were held not permissible, the scope of the protection of the Fourth Amendment, which the Supreme Court has long struggled to define, would be broadened to amorphism. Eavesdropping in any form carries with it the stigma of impoliteness and is not "cricket" in the realm of social intercourse. But the prevention and detection of crime is not a polite business and we see no need or justification for reading into the Fourth Amendment a standard of conduct for law enforcement officials which would leave society at the mercy of those dedicated to the destruction of the very freedoms guaranteed by the Constitution.

The "pursuit of happiness" referred to by Justice Brandeis in Olmstead can be destroyed by idealistic theory that shuns the deadly realism of crime. We do not consider the conduct of the agents in the case at bar to violate the compulsion of the Fourth Amendment or, indeed, to be even subject to criticism.

Appellants also complain that the testimony of the witnesses Johnson and Perkins introduced evidence of misconduct on the part of appellant Turner unrelated to the charges of the indictment. Johnson and Perkins were not named as victims of the fraudulent scheme in the indictment, but their testimony was that they had been contacted by Turner after mailing to BBLSC the inquiry solicitation and showed Turner's active participation in offering false and fraudulent inducements. The evidence was within the charge of

the indictment relating a scheme to defraud certain named victims and "divers other persons to the grand jury unknown"; the testimony cannot be said to have been a surprise to the appellants, *Webb v. United States*, 10 Cir., 191 F. 512; and the evidence was important to the prosecution to show the intent and motive of Turner, *Harris v. United States*, 6 Cir., 13 F. 849; 849; *Roper v. United States*, 10 Cir., 54 F. 845.

AFFIRMED.

APPENDIX "B"

Before LEWIS, BREITENSTEIN and RITTER, JJ.
RITTER dissenting.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment and sentence of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered by this Court that Edward W. Anspach, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado in execution of the judgment and sentence imposed upon him within 10 days from and after the date of the filing of the mandate of this Court in said District Court.

Entered June 27, 1962.

APPENDIX "C"

Before LEWIS, BREITENSTEIN and RITTER, JJ.
RITTER dissenting.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment and sentence of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered by this Court that Walter F. Turner, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado in execution of the judgment and sentence imposed upon him within 10 days from and after the date of the filing of the mandate of this Court in said District Court.

Entered June 27, 1962.